United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 977

Case No. 1080: JOHNSTON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Hubert Thierry, President; Mr. Kevin Haugh; Ms. Marsha A. Echols;

Whereas, on 3 May 1999, Susanna H. Johnston, a staff member of the United Nations, filed an application containing pleas which read as follows:

"7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and chapter IV of its Rules;

(d) *To order* the Office of Internal Oversight to produce its files on the Applicant's case.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To rescind* the decision of the Secretary-General imposing the disciplinary penalty of demotion to the P-4 level with no possibility of promotion for three years;

(b) *To order* that the Applicant be reinstated to her former grade and step with retroactive effect from February 1999;

(c) *To find and rule* that the Joint Disciplinary Committee erred in matters of fact and law and that its recommendation as well as the resulting decision of the Secretary-General were tainted by prejudice and other extraneous considerations;

(d) *To find and* rule that the manner in which the Respondent conducted his initial investigation and subsequent disciplinary review were procedurally flawed, tainted by extraneous considerations and repeatedly violated the Applicant's rights to due process;

(e) *To award* the Applicant compensation in the amount of three years net base pay for the damage to her career and reputation and for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(f) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules [of the Tribunal], the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case;

(g) *To award* the Applicant as cost, the sum of $5,000 in legal costs and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 5 January 2000;

Whereas the Applicant filed written observations on 20 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of theWorld Health Organization, New York Liaison Office, on 1 July 1968, as a Clerk/Typist on a fixed-term contract, at the G-3 level. Effective 30 June 1972, the Applicant was granted a fixed-term appointment and transferred to the Office of Conference Services at Headquarters with the functional title of Editorial Assistant. She was promoted to the G-4 level on 1 April 1973. Effective 1 April 1975, she was promoted to the G-5 level and granted permanent status on 1 March 1976.

After successfully passing the 1980 Competitive Examination for Promotion to the Professional category of staff members from other categories, the Applicant was appointed as Associate Administrative Officer, Stenographic Section, Editorial and Official Records Division, Department of Conference Services at the P-2 level. On 16 May 1983, she was reassigned to the Distribution Section, Publishing Division, and on 1 April 1984, she was promoted to the P-3 level. Effective 6 August1987, she was appointed Deputy Chief of the Sales Section of the Publishing Division, and subsequently on 23 June 1990, she became Chief of the Sales Section. On 1 October 1991, she was promoted to the P-5 level.

As part of the United Nations 50th Anniversary Celebration (UN50), in 1995, the Applicant's Sales Section was assigned the responsibility to arrange for the marketing of commemorative souvenir items and to design and produce a sales brochure. Included in its duties, the Sales Section was requested to make initial contact with vendors, in order to find the lowest acceptable contract bidders, oversee the contracts and certify any required payments.

On 26 October 1994, six vendors were approached and asked for quotes for the production of 50th Anniversary gift item sales brochures. One of the vendors contacted was a company known as "Art Around the Clock" (AAC), a New York Corporation, whose president was Robert Versandi.

On 18 November 1994, AAC signed a contract with the United Nations to design and prepare artwork for and print one hundred thousand copies of a brochure for UN50 sales items. AAC was paid for its work the sum of $14,275. Subsequently, on 4 April 1995, AAC entered into another contract with the United Nations for an additional 120,000 brochures on the same subject for a payment of $19,335. On 16 August 1995, AAC was engaged to produce 100,000 copies of another brochure for a payment of $25,950.

On 13 October 1997, the Investigation Section, Office of Internal Oversight Services (OIOS) issued a report of an investigation which revealed that the Applicant had played an active role in organizing and awarding the three contracts with a total value of $59,560 to AAC, the company owned by Mr. Versandi, who, the investigator discovered, was her "boyfriend". The report also stated that on 1 November 1994, she filed AAC's certificate of incorporation with the State of New York using her own name and home address as the Company's business address, and that the Applicant was named in the contracts as the party to receive copies of any required written notices.

The report concluded that the Applicant's association with the company and her role in the award and administration of the contracts was a conflict of interest in direct contravention of staff rule 101.6. It was recommended that disciplinary action be taken and that she be summarily dismissed.

On the same day, the Under-Secretary-General, OIOS, sent the report to the Assistant Secretary-General, Department of Public Information (DPI), indicating that the evidence confirmed the findings of the investigation. On 21 October 1997, the Assistant Secretary-General, DPI, suggested that the case be referred to the Office of Human Resources Management (OHRM) for appropriate action.

On 9 March 1998, the Director, Specialist Services Division, OHRM, informed the Applicant of the charges, requested her to submit a written explanation and advised her of her right to counsel.

On 8 and 14 April 1998, the Applicant submitted her responses to the allegations of misconduct, as requested.

On 14 July 1998, the Applicant was notified that her case would be submitted to the Joint Disciplinary Committee (JDC).

The JDC submitted its report on 6 January 1999. Its conclusion and recommendations read as follows:

> "***Conclusion***
>
> 69. The Panel was of the undivided opinion that [the Applicant] was given a position of special trust as Chief of UN's Sales Section, and she used that position to influence the decision to award the UN50 contracts to AAC, a company owned by her friend, and with the management of which she was actively associated. This conduct violated staff rule 101.6 (b), fell short of the standard of conduct expected of an international civil servant, and amounts to serious misconduct warranting disciplinary sanction.
>
> ***Recommendations***
>
> 70. In light of the foregoing, the Panel *unanimously recommended* that [the Applicant] be demoted to the P-4 level without the possibility of promotion for a period of three years.
>
> 71. The Panel was of the view that due to the serious nature of [the Applicant]'s misconduct, and the fact that she breached the trust of the Organization, she should not

continue to serve as the Chief of the Sales Section, and in the future, she should not be given any post with certification authority."

On 4 February 1999, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"...

The Secretary-General has examined your case in the light of the Committee's report. He has taken note that the Committee first addressed the procedural issues you raised and found no violations of due process that would vitiate disciplinary proceedings against you. The Secretary-General thus considers that due process requirements have been duly observed by the Administration in your case.

The Secretary-General has taken note of the Committees's reasoning that, in order to establish that your conduct violated staff rule 101.6 (b), it must be ascertained that you were actively associated with the management of AAC and that it was possible for you to benefit from your association with AAC by reason of your position as Chief of the UN's Sales Section. The Committee found that cumulative evidence exists pointing to the fact that you were actively associated with the management of AAC. The Committee also found that it was possible for you to benefit from your association with AAC by recommending to the UN50 Secretariat that AAC be included in the bids and subsequently be awarded the contracts for the production of the UN50 promotional sales brochures.

The Secretary-General has further taken note of the Committee's undivided opinion that you were given a position of special trust as Chief of the UN's Sales Section and that you used that position to influence the decision to award the contracts to AAC, a company owned by your friend and with the management of which you were actively associated. The Committee therefore concluded that your conduct violated staff rule 101.6 (b), fell short of the standard of conduct expected of an international civil servant and amounts to serious misconduct warranting disciplinary action.

The Secretary-General ... is in agreement with those findings and conclusion. He also considers that your conduct violated in particular paragraph 4 of the Report on the Standards of Conduct in the International Civil Service.

... in accordance with the unanimous recommendation of the Committee, the Secretary-General has decided that you be demoted to the P-4 level, with effect from close of business on the day you receive this letter, and with no possibility for promotion for three years. The Secretary-General has also decided that, after the three years have elapsed, you

would be entitled to the same consideration for promotion as other staff members in accordance with the relevant Staff Regulations and Rules and administrative issuances.

The Secretary-General has also taken note of the Committee's suggestions that you should not continue to serve as the Chief of the Sales Section and, in the future, you should not be given any post with certification authority. The Secretary-General considers that those suggestions fall outside the Committee's mandate as they are not a recommendation for a disciplinary measure within the scope of chapter X of the Staff Regulations and Rules.

..."

On 3 May 1999, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The conclusions reached by the JDC are unsupported by credible evidence.

2. The JDC erred as a matter of law in its interpretation of the burden of proof in disciplinary proceedings.

3. The JDC erred on matters of fact and procedure crucial to the Respondent's case.

4. The JDC proceedings were tainted by procedural irregularities.

5. The discretionary authority of the Secretary-General in dismissing the Applicant for misconduct was applied in an arbitrary and capricious manner.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to meet the standards of conduct required of staff members and international civil servants.

2. The Applicant's due process rights were fully respected.

3. There has not been any substantive irregularity in the Applicant's case.

4. The Applicant's case was properly assessed and was not influenced by any extraneous considerations.

The Tribunal, having deliberated from 2 to 17 November 2000, now pronounces the following judgement:

I. The Applicant's career with the United Nations has been outstanding and characterized by rapid promotions. Originally recruited by the World Health Organization in July 1968 as a G-3 clerk, she was appointed in 1990 to the important post of Chief of the Sales Section of the United Nations and in 1991 was promoted to the P-5 level. In 1999, however, the Applicant was subjected to a penalty which, while not extremely serious (as would have been dismissal), nonetheless is a major blemish on her professional record. By decision of the Secretary-General dated 4 February 1999, she was demoted to P-4 without possibility for promotion for three years. The Secretary-General however specified that, following that period, she would fully recover her right to be considered for promotion.

This penalty was imposed on the basis of a report by the OIOS, whose purpose is to assist the Secretary-General in fulfilling his responsibilities in respect of the use of the Organization's resources, and also on the basis of a recommendation adopted unanimously by the JDC.

The failings of which the Applicant was accused, and which were considered to constitute serious misconduct and violations of staff rule 101.6 (b) and staff regulation 1.4, relate to her role as Chief of the Sales Section in the awarding of contracts to the corporation "Art Around the Clock", whose president was her personal friend, for the publication of a brochure relating to items for sale on the occasion of the fiftieth anniversary of the United Nations.

The conclusion of the JDC on this subject, which was approved by the Secretary-General, was as follows:

> "69. The Panel was of the undivided opinion that [the Applicant] was given a position of special trust as Chief of UN's Sales Section, and she used that position to influence the decision to award the UN50 contracts to AAC, a company owned by her friend, and with the management of which she was actively associated. This conduct violated staff rule 101.6 (b), fell short of the standard of conduct expected of an international civil servant, and amounts to serious misconduct warranting disciplinary sanction."

The Applicant is appealing against the decision of the Secretary-General, requesting that it be rescinded and that she be reinstated in the P-5 level and awarded substantial compensation.

The Secretary-General has considerable discretionary authority in disciplinary matters; the Tribunal, whose competence in this area has recently been defined (Judgement No. 941, *Kiwanuka*

(1999)), may rule on the legality of the penalty but not on its appropriateness. The Tribunal will therefore consider the process whereby the penalty was adopted and will also verify whether the Secretary-General could consider that the facts constituted violations of staff rule 101.6 (b) and staff regulation 1.4.

II. The Applicant has not produced any proof, or even *prima facie* evidence, of discrimination against her, even though it may be said that the OIOS was somewhat overzealous, as reflected in its recommendation that the Applicant should be immediately dismissed; that recommendation was not followed by either the JDC or the Secretary-General. Nor is there any proof or *prima facie* evidence that the penalty was motivated by extraneous factors.

There were, however, certain irregularities in the process which led to the penalty, particularly on the part of the OIOS. For example, the OIOS relied on a record of a conversation with the Applicant although it had been neither submitted to nor signed by her, and its final report also was not transmitted to her before being submitted to a higher authority. The confidentiality of the work of the OIOS was breached when information concerning the Applicant was published in the press. Lastly, it would seem that there is room for debate regarding the documents which were submitted to the JDC and that the Committee might have wished to hear witnesses - although it is not strictly obliged to do so - whereas in this case it did not.

These flaws are regrettable, and the Tribunal attaches the greatest importance to strict observance of procedures, particularly where their purpose is to protect the rights of United Nations staff members. However, the Tribunal does not consider that the proceedings in this case were vitiated by substantial errors, omissions or failings of a sufficiently serious nature as to render them void; the JDC carried out a thorough examination of the facts and produced a 15-page report, and - most importantly - the Applicant, accompanied by Counsel, appeared before the Committee and was given every opportunity to answer the accusations against her.

III. In reaching an opinion as to the legality of the penalty, it is not for the Tribunal to say whether it was justified (provided that it was not disproportionate) but only whether the penalty was compatible with the provisions under which it was imposed.

Staff rule 101.6 (b) states:

> "No staff member may be actively associated with the management of, or hold a financial interest in, any business concern if it were possible for the staff member to benefit from such association or financial interest by reason of his or her official position with the United Nations."

To fail to perform his or her obligations, therefore, it suffices that a staff member should have been associated with the management of a business concern if he or she might benefit from such association by reason of his or her official position with the United Nations.

In this regard, it has not been denied:

(1) That the president of "Art Around the Clock" was a friend of the Applicant; or

(2) That the Applicant has, at least on certain occasions, rendered assistance to the management of "Art Around the Clock", for example by arranging for the company to be incorporated with the New York State authorities and by giving her address for correspondence resulting from that incorporation;

(3) That as Chief of the Sales Section she contributed to the award of contracts to "Art Around the Clock", without disclosing - and the Tribunal considers this to be an important point - her relationship with the president of the company who, incidentally, is also its owner.

The Tribunal considers that there is no legal reason why the Secretary-General should not have considered these facts as constituting breaches of staff rule 101.6 (b).

Attention should also be drawn to staff regulation 1.4, which provides that:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

In this instance, this provision is no less important than staff rule 101.6 (b). Thus, it was legitimate for the Secretary-General to consider that the penalty he had decided to impose was, given all the circumstances, appropriate in the light of the Applicant's failure to display the prudence expected of her in the exercise of an important responsibility involving United Nations funds.

The Tribunal therefore considers that, as regards both the procedure which led to its adoption and the statutory provisions, the penalty imposed on the Applicant cannot be considered legally unfounded.

IV. For the above reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Kevin HAUGH
Member

Marsha A. ECHOLS
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary